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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORACAO DE MINAS

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims entered in this case on January 20, 1960, the writ to issue, however, only in the event that this Court grants the petition for a writ of certiorari in No. 209, this Term.

OPINION BELOW

The opinion of the Court of Claims (Pet. App.[1] 17–26) is reported at 180 F. Supp. 342.

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[1] "Pet. App." refers to the petition in No. 209, this Term, in which the opinion below is set forth.

JURISDICTION

The judgment of the Court of Claims was entered on January 20, 1960. Petitioner's motion for rehearing was denied on April 6, 1960. On July 2, 1960, the time for filing a cross-petition for a writ of certiorari was extended by Mr. Chief Justice Warren to and including September 3, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims misconstrued the contingent fee clause in a government procurement contract in holding that the employment of two individuals essentially responsible for obtaining a contract with the Government did not violate that clause.

CONTRACT PROVISION INVOLVED

> ARTICLE XVII. *Contingent Fees.* The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or undertaking for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage or contingent fee.

STATEMENT

This action was brought by the respondent in the Court of Claims seeking damages for an alleged breach of its contract with the United States for the production of tungsten in Portugal and the sale of such tungsten to the United States. After a lengthy trial, the Court of Claims held that the Government had committed a breach of the contract; rejected the Government's contention that the respondent's employment of two individuals who negotiated and executed the contract in its behalf violated a clause of the contract prohibiting the payment of a contingent fee therefor; and awarded damages of $508,200.

In No. 209, this Term, the respondent seeks review of that decision on the ground that it was entitled to greater damages. We are filing a brief in opposition in that case. The present conditional cross-petition raises the issue whether the contingent fee provision of the contract was violated. While this issue may not independently warrant review, we believe that it should be reviewed if the Court grants the petition in No. 209. A respondent can always rely upon additional grounds for supporting the judgment below. However, the Government's argument on the contingent fee provision, if accepted, would not only support the judgment below in the sense that it would preclude any increase in the damages, but would absolve the Government of any liability. For that reason, a conditional cross-petition is appropriate. See *Alaska Industrial Board* v. *Chugach Electric Association*, 356 U.S. 320, 324–325.

The findings with respect to the negotiation and execution of the contract are summarized in our

brief in opposition in No. 209. We shall summarize here only those findings that deal with the contingent fee question.

1. *The Findings Below.* The negotiation of the petitioner's contract with the United States was accomplished by two Americans, Colonel Lawrence Westbrook and Mr. Heinz Pulvermann. Colonel Westbrook's background included management of cotton and ranching interests, executive and advisory positions with various state and federal relief organizations, and subsequent to military duty in World War II, positions with the American subsidiary of a French engineering and banking concern and as executive director of the staff of the Defense Housing Commission of the Department of Defense (F. 6(a)–(h)). During part of the time spent on negotiations of this contract, he also served as Assistant Chairman of the Democratic National Committee (F. 6(j)). At the time he began his efforts to obtain a contract for the petitioner with the United States, Colonel Westbrook had embarked on freelance endeavors under the name of "Westbrook Associates", a flexible organization consisting of himself and any other person with whom he might collaborate in various business ventures (F. 6(i)).

Mr. Pulvermann was of German background, having held executive positions in various lignite companies in that country prior to fleeing from the Nazi regime (F. 7(a)(c)(d)). After a period in France where he engaged in refugee rehabilitation work, he came to this country, was naturalized in 1950 and engaged in various types of salesmanship, promotion

and international brokerage (F. 7(e)). His only activity with Colonel Westbrook, prior to this contract, was as consultant to German mining organizations on the reconstruction of workers' housing (F. 8(b)).

It was Mr. Pulvermann, who, on a trip to Portugal, first became aware of Dr. Soares' plan to form the petitioner with the purpose of obtaining a long-term contract to permit profitable organization and development of certain Portuguese tungsten sources (F. 34, *et seq.*). He returned to this country, informed Colonel Westbrook of the plan, and the two initiated contacts with American Government officials in an effort to obtain a long-term contract for tungsten with the United States (F. 34, *et seq.*). Colonel Westbrook continued his efforts in this country, attempting to obtain a contract with the United States while Mr. Pulvermann spent a good part of the contract negotiation period in Portugal (F. 34, *et seq.*).

Prior to full engagement in these activities, the two men determined on a basis of compensation for their services to the petitioner (F. 39(b)). They resolved on payment on a commission basis, their contract with the petitioner providing essentially for compensation of five per cent on all sales under the contract up to specified tonnages (F. 39(b), 50(b)). They further decided, on advice of counsel, that their contract should describe them as sales agents (F. 39(b)).[2]

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[2] The contract between the petitioner and Colonel Westbrook and Mr. Pulvermann also described them as "industrial consultants" to the petitioner and as exclusive sales agents for

The Court of Claims found that Colonel Westbrook, drawing on his knowledge of Government procedures and acquaintances with Government officials, elective and appointive, limited his influence to "what is known in Washington as the opening of doors"[3] (F. 137(c)), and "his advocacy was rested on the merits of his case" (F. 137(c)). The court also found that it was accepted practice in both business and Government during this period for businesses to attempt to secure Government contracts through the use of contingent fee arrangements with bona fide employees or bona fide established commercial or selling agencies maintained by the contractor (F. 135). Further, the court found that the arrangement for compensation on a percentage-of-sales basis was made in good faith by the petitioner and the two Americans to create incentives for all concerned, and that the contingent fee agreement contemplated the performance of substantial services to the petitioner by Colonel Westbrook and Mr. Pulvermann which were, in fact, rendered (F. 137).

2. *The Opinion Below.* In its opinion (Pet. App. 17–26), the Court of Claims ruled that the petitioner's agreement with Colonel Westbrook and Mr. Pulvermann did not violate the warranty against contingent fees in the contract. In the court's view, it was only by dint of the experience and qualifications of the

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securing contracts for various metals in the United States and Europe (F. 50(b)).

[3] With respect to some of the contacts on which this finding is presumably based, see Findings 19(b), 43, 44, 45, 56(c), 61, 87(a), 88(a).

two men and their perseverance in pressing the petitioner's offer that the contract with the United States was finally consummated. The court also pointed to the industrial consulting work done on the petitioner's behalf by Colonel Westbrook and Mr. Pulvermann. It concluded that Companhia Atlantica had not committed a breach of the warranty against contingent fees in that Colonel Westbrook and Mr. Pulvermann fell within the exception (see *supra*, p. 2) covering "bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business".

REASONS FOR GRANTING THE WRIT

Had the Court of Claims not held that Colonel Westbrook and Mr. Pulvermann came within the exception in the warranty against contingent fees covering "bona fide employees or bona fide established commercial or selling agencies * * *," the United States would have had a complete defense to the petitioner's action below since, under the express terms of the warranty, it had the right to annul the contract without liability.

The warranty in Government contracts against contingent fee arrangements reflects a firmly rooted principle of public policy which condemns the tendency of such agreements toward improper solicitation of and pressure on public officers, even though in a particular case it may be impossible to establish that improper means were, in fact, contemplated or used. As this Court stated with regard to contingent fee contracts in *Tool Co.* v. *Norris*, 2 Wall. 45, 56:

> * * * it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.

The same concept has been consistently applied by this Court on other occasions. *E.g., Muschany* v. *United States*, 324 U.S. 49, 64; *Hazelton* v. *Sheckells*, 202 U.S. 71, 78–79.

While the Court of Claims found that Colonel Westbrook had used his influence "to open doors" (F. 137(c)), it ruled that Colonel Westbrook and Mr. Pulvermann came within the express exception to the warranty. In our view, whether the opinion below is read as classifying these men as bona fide employees, or as constituting a bona fide established commercial or selling agency of Companhia Atlantica,[4] the Court of Claims erred. Under the very terms of the exception itself, the applicable case law and the General Services Administration regulations on the question of contingent fee contracts,[5] to be a bona fide employee of a contractor within the meaning of the ex-

[4] Each of the two categories is used by the Court of Claims at different points in its opinion.

[5] 44 C.F.R. § 150.1, *et seq.*

ception, one must be subject to the right of his employer to exercise supervision and control as to time, place, and manner of performance of work. It is clear from the record and the findings below that Companhia Atlantica possessed no such right nor exercised any control over the activities of either Colonel Westbrook or Mr. Pulvermann. On the other hand, the record and findings below are equally clear in demonstrating that these men were not a commercial or selling agency within the meaning of the exception since they were manifestly not an *established* agency maintained by the contractor.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, if the Court grants the petition for a writ of certiorari in No. 209, this Term, then it should also grant this conditional cross-petition for a writ of certiorari.

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Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Opinion Below

The opinion of the Court of Claims (Pet. App.[1] 17-26) is reported at 180 F. Supp. 342.

Jurisdiction

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by Mr. Chief Justice WARREN to and including September 3, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

Question Presented

Whether the Court of Claims properly held that respondent's bona fide employment of two exclusive sales agents, under a contingent compensation agreement which was disclosed to petitioner at the outset of negotiations, did not justify petitioner's cancellation on other grounds of its procurement contract with respondent.

Contract Provision Involved

> ARTICLE XVII. CONTINGENT FEES. The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or undertaking for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage or contingent fee.

Statement

Respondent brought this action for breach of its long-term contract to sell tungsten to the United States. Petitioner had cancelled the contract on the ground that respondent had violated Article XX (d) thereof. It defended the action on the additional grounds, not stated at the time of cancellation, of inability to perform and violation of Article XVII, the contingent fee warranty

clause of the contract. The Court of Claims gave judgment for respondent after finding that the stated ground for cancellation was non-existent and the other grounds were without merit.

The principal facts concerning the negotiation and execution of the contract are set forth in respondent's petition in No. 209, this Term, which seeks review of the measure of damages applied by the court. This conditional cross-petition is limited to an attack on the court's decision that the defense founded on alleged violation of the contingent fee warranty clause was without merit. Only a few additional facts need to be stated.

The arrangement which petitioner claims to be in violation of the contingent fee clause is expressed in a written agreement dated August 22, 1951, between respondent and Colonel Lawrence Westbrook and Heinz Pulvermann, who were thereby appointed exclusive sales agents and industrial consultants to respondent (50(b)).[1] A copy of this agreement was attached to the first offer made by respondent to petitioner on October 16, 1951, reviewed with the Government contracting officer, Captain Maull, and retained in the petitioner's files (5(b), 57 (d)). At no time during the subsequent negotiations did any Government representative object to respondent's commission arrangement with Westbrook and Pulvermann.

The Trial Commissioner and the Court of Claims have found that the compensation agreement was made in good faith on both sides to provide mutually acceptable incentives for participation by Westbrook and Pulvermann as coventurers in respondent's enterprise; that it contemplated the performance of substantial services, which were in fact rendered, as *quid pro quo* for the contingent fee; that both men had unusual qualifications and experience for the work which they undertook; that, while Colonel West-

[1] Figures in parentheses refer to the findings of the Court of Claims.

brook used his experience in Government to open doors, his advocacy was rested on the merits of the case; and that Westbrook and Pulvermann were bona fide employees or selling agencies excepted from the warranty (136, 137; Pet. App. 22-23).

Argument

Petitioner in effect is asking this Court to redetermine the facts as found by the Trial Commissioner and adopted by the Court of Claims. Petitioner's reliance on the regulations issued by the General Services Administration, 44 C.F.R. §150, is misplaced. We agree with petitioner that these regulations correctly set forth the controlling criteria for interpreting the warranty clause. It is precisely these criteria, however, which the court's findings demonstrate have been met. We invite particular attention to the stated objective of the warranty:

> "• • • The prevention of improper influence in connection with the obtaining of Government contracts, the elimination of arrangements which encourage the payment of inequitable and exorbitant fees bearing no reasonable relationship to the services actually performed and the prevention of unwarranted expenditure of public funds which inevitably results therefrom." (§150.3)

The Court has been most emphatic in its findings of complete good faith and absence of all impropriety in the contingent fee arrangement belatedly attacked by petitioner. Moreover, the GSA regulations explicitly recognize that the factors to be used in testing whether or not an arrangement complies with the warranty are to be used as guides to judgment, and that no single factor is determinative in itself:

> "They [the factors] are necessarily incapable of exact measurement or precise definition and it is

> neither possible or desirable to prescribe the relative weight to be given any single factor as against any other factor or as against all other factors. The conclusions to be reached in a given case will necessarily depend upon a careful evaluation of the agreement and other attendant facts and circumstances." (§150.5(c)(2))

It is just such a "careful evaluation of the agreement and other attendant facts and circumstances" that the commissioner and the court have made. This is their proper function; it does not appear that they have discharged it incorrectly.

Petitioner urges, however, that the warranty clause "reflects a firmly rooted principle of public policy which condemns the tendency of [contingent fee] agreements toward improper solicitation of and pressure on public officers, even though in a particular case it may be impossible to establish that improper means were, in fact, contemplated or used" (Pet. 7). For this proposition it cites *Tool Co.* v. *Norris*, decided by this Court in 1851, more than 50 years before the introduction of the standard contingent fee warranty clause into Government contracts. It would seem that petitioner ought not to be able to rely both on *Tool Co.* and on the GSA regulations, for they are in conflict. In any event, the administrative and legislative history of the warranty clause, discussed by the Court of Claims in its opinion (Pet. App. 23-24), establish that the warranty clause was not intended to forbid customary and honest business practices in dealing with the Government (cf. Finding 135).

Even if it should be concluded that respondent had committed some technical violation of the clause, this would not, as petitioner asserts (Pet. 7), give it a complete defense to respondent's action. The Court of Claims has found that the Government's negotiating officials, to whom

the contingent fee agreement was disclosed when negotiations began, must have "then and there" decided that the arrangement did not violate the warranty. It held that in these circumstances, the Government should not be permitted (short of a showing that evils were present) "to awaken such a 'sleeper'" to justify its cancellation of a contract which it purported to cancel on another ground which it cannot now defend (Pet. App. 24-25). Defendant is therefore precluded from asserting violation of the warranty as a defense. Cf. *Service* v. *Dulles*, 354 U. S. 363, 372 (1957); *David J. Joseph Co.* v. *United States*, 113 Ct. Cl. 3, 82 F. Supp. 345 (1949).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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As required by GSA regulations, 44 CFR §§1506.1-1013